DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of DIRECTV ENTERPRISES, INC. To Amend Parts 2, 25 and 100 of the Commission's Rules To Allocate Spectrum for the Fixed-Satellite Service and the Broadcasting-Satellite Service	)	RM No. 9118

REPLY OF DIRECTV ENTERPRISES, INC.

Gary M. Epstein
John P. Janka
James H. Barker
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200

August 19, 1997

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service	)))))	ET 97-99

REPLY OF DIRECTV ENTERPRISES, INC.

DIRECTV Enterprises, Inc. ("DIRECTV"), hereby replies to the Joint Consolidated Opposition to Petitions for Reconsideration and Applications for Review to June 24, 1997 DEMS License Modification Order, filed on August 7, 1997 ("Joint Opposition") of Teligent, L.L.C., Microwave Services, Inc., and Digital Services Corporation (collectively, the "DEMS Licensees").

I. DIRECTV CLEARLY HAS STANDING TO CHALLENGE COMMISSION ACTIONS TAKEN IN THE MODIFICATION ORDER

The DEMS Licensees argue that all of the parties seeking review of the Commission's order modifying DEMS licenses in the 18 GHz band (1) to allow DEMS operation in the 24 GHz band, and (2) to prohibit the use of the 18 GHz band for DEMS after midnight, January 1, 2001, subject to certain conditions, lack standing.[1] That contention, at least with respect to DIRECTV, is wrong.

---

[1] Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service, DA 97-1285, *Order* (released June 24, 1997) ("Modification Order").

First, to the extent that the Modification Order is a direct consequence of the DEMS Order,[2] which was adopted by the Commission improperly without notice and comment, DIRECTV and other interested parties plainly have standing to challenge the Commission's failure to follow required notice and comment procedures before taking actions that have significant potential to adversely affect their interests. The D.C. Circuit "has held unequivocally" that where a party "complains of an agency's failure to provide notice and comment prior to acting, it is that failure which causes 'injury'; and interested parties are 'aggrieved' by the order" embodying the challenged agency action.[3]

Second, on the merits, DIRECTV, perhaps more than any other petitioner in this proceeding, clearly meets constitutional and prudential standing requirements to challenge the substantive actions taken by the Commission in the DEMS Order. The 24 GHz band has been allocated internationally for BSS use for five years, and DIRECTV has filed both a Petition for Rulemaking to allocate the 24.75-25.25 GHz band for FSS uplinks to BSS stations, and an application for a six-satellite BSS expansion system to use these bands.[4]

If the DEMS Order and the Modification Order remain unchanged, DIRECTV will face the prospect of serious constraints in the operation of its expansion satellite system by

---

2 Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service, 62 Fed. Reg. 24, 576 (May 6, 1997) ("DEMS Order").

3 *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citation omitted).

4 *See* Petition of DIRECTV Enterprises, Inc. To Amend Parts 2, 25 and 100 of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite Service and the Broadcasting-Satellite Service, RM No. 9118 (June 5, 1997); Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).

virtue of the operations of relocated DEMS licensees, and in some areas, a possible *inability* to uplink its expansion system BSS signals at 24 GHz -- a consequence that would be traceable directly to the Commission's actions in the DEMS Order and the Modification Order. Indeed, the DEMS Licensees themselves allege that "BSS service uplinks are not compatible with terrestrial DEMS systems."[5] Under such circumstances, the Commission's actions plainly pose the prospect of "actual economic injury" sufficient to satisfy Article III "injury-in-fact" requirements,[6] and DIRECTV's status as an "actual or potential" 24 GHz spectrum applicant places DIRECTV clearly within the prudential "zone of interests" protected by the Communications Act.[7] DIRECTV therefore undisputedly has standing to challenge the Commission's actions taken in both the DEMS Order and the Modification Order.

---

5 Joint Opposition to Petition for Rulemaking of DIRECTV Enterprises, Inc., RM No. 9118 (July 31, 1997), at 11.

6 *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 397 & n.13 (1987) (recognizing that alteration of competitive conditions has probable economic impact which satisfies "injury-in-fact" test); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (one "likely to be financially injured" by agency action has standing to challenge that action); *Coalition for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995) (inability to file applications to compete for larger unserved areas due to agency action constituted "actual economic injury sufficient to establish 'injury-in-fact'").

7 *JEM Broadcasting Co.*, 22 F.3d at 326 ("actual or potential license applicants" were "aggrieved" within meaning of 28 U.S.C. § 2344, and thus had standing to challenge FCC action); *see also Coalition for Effective Cellular Rules*, 53 F.3d at 1316 (interest in ensuring agency compliance with statutory licensing procedures "clearly falls" within zone of interests protected by the Communications Act necessary to establish standing to challenge FCC rules).

II. THE COMMISSION'S MODIFICATION OF ALL DEMS LICENSES TO PERMIT DEMS OPERATIONS AT 24 GHz CANNOT BE JUSTIFIED AS AN EXERCISE OF A "MILITARY FUNCTION"

DIRECTV has petitioned for reconsideration of the DEMS Order, and has shown that the Commission's actions in adopting it were arbitrary and capricious, and improperly taken without prior public notice to, or the opportunity for comment by, DIRECTV and other affected parties. To the extent the Modification Order is based on those same actions, it is legally unsustainable as well. The Commission's wholesale relocation of DEMS licensees to 24 GHz on the basis of the Administrative Procedure Act's "military function" exception was unnecessary to address the limited national security concerns presented to the Commission by the National Telecommunications and Information Administration ("NTIA").[8]

A. The DEMS Licensees Continue to Distort the Scope of NTIA's National Security Concerns

The DEMS Licensees persist in mischaracterizing the NTIA letters that explained the Department of Defense's interference concerns relating to DEMS operations at 18 GHz. The DEMS Licensees claim that these letters justified an immediate, nationwide relocation of DEMS operations by the Commission on the basis of national security concerns, without notice to and comment from affected parties. Yet, a plain reading of the text of those letters flatly contradicts the DEMS Licensees' position. The NTIA Letters are unambiguous in their focus on an important, but narrow, interference concern *solely* in *Denver and Washington.* There is no room creatively to "interpret" them broadly, as the DEMS Licensees attempt to do, especially given the

---

[8] *See* Petition for Reconsideration of DIRECTV Enterprises, Inc., ET 97-99 (June 5, 1997); Consolidated Reply of DIRECTV Enterprises, Inc., ET 97-99 (July 23, 1997).

fact that the military function exception is to be "narrowly construed and reluctantly countenanced."[9]

On January 7, 1997, the NTIA submitted to the FCC a written request, encapsulated in the very first paragraph of that letter, that the Commission "protect *two* government earth stations."[10] The NTIA explained that these earth stations, located "in the Denver CO and Washington, D.C. areas," were associated with Government "space stations in the fixed-satellite service that operate at 17.8 - 20.2 GHz that need to be protected."[11] The NTIA further explained that it had determined that licenses had been granted to DEMS networks that "include both the Denver and Washington areas," and that "co-frequency, co-coverage use of the 17.8-20.2 GHz band by earth stations of the Government fixed-satellite service and the non-Government DEMS will not be possible within 40 km of our earth stations" in those areas.[12]

The follow up letter submitted by the NTIA to the FCC on March 5,1997,[13] also addressing the interference issue, again highlights the very limited nature of the NTIA's national security concern. The NTIA did *not* request that the FCC terminate all DEMS licenses at 18.82-18.92 GHz and 19.16-19.26 GHz, nor did it request "replacement licenses" for all DEMS

---

9 *Independent Guard Ass'n v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995).

10 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997, at 1 ("First NTIA Letter") (emphasis added).

11 *Id.*

12 *Id.* at 2.

13 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated March 5, 1997 ("Second NTIA Letter").

licensees at 24 GHz; instead, it requested termination and replacement licenses *only* for DEMS operations "*anywhere within the exclusion zones defined in Attachments A*" -- *i.e.*, zones with center coordinates in Washington, D.C. and Denver.[14] Neither did the NTIA request that the FCC exclude all future licensees from using the 18 GHz band; instead, it requested exclusion *only* of future licensees proposing to operate "*anywhere within the exclusion zones defined in Attachment A.*"[15]

The claim of the DEMS Licensees that the NTIA letters contain a "national security" mandate for the Commission to take all of the actions in the DEMS Order, including "nationwide" DEMS relocation,[16] is insupportable. To be sure, after having articulated the interference issue involving the Government earth stations in Denver and Washington, D.C., NTIA also attempted to anticipate some of the *commercial* policy concerns with which *the FCC* was likely to grapple. For example, NTIA specifically noted its "understanding" of *the FCC's* desire to have frequencies made available for DEMS use on a nationwide basis,[17] and offered to make spectrum available at 24.25-24.65 GHz for DEMS use -- obviously more spectrum than necessary to address the national security problem identified -- in order to accommodate *Commission* policy goals that might be broader than NTIA's own interference problems. But the

---

14 *Id.* at 1, ii) & Attachment A (emphasis added).

15 *Id.* at 1, iv) & Attachment A (emphasis added). In light of the careful limitation of the DEMS relocation request in the NTIA proposal (the Washington, D.C. and Denver exclusion and coordination zones specified in the letter's Attachment A) the suggestion by Teledesic that the Second NTIA Letter "nowhere suggests that NTIA's national security concerns related only to the relocation of DEMS in Washington, D.C., and Denver," Teledesic Opposition at 8, is clearly incorrect.

16 Joint Opposition at 12.

17 First NTIA Letter at 2.

mere fact that the NTIA has released government access to spectrum that could facilitate a permanent, nationwide DEMS relocation does not create a nexus to a "military function" that can justify waiving Administrative Procedure Act's notice and comment procedures for the wholesale relocation of DEMS operations outside of Washington, D.C. and Denver.

In this regard, it is plain that the DEMS Order effected a mix of regulatory changes, the majority of which do not relate in any way to a "military function."[18] The Commission expressly found that NTIA's interference concerns could be addressed in their entirety by relocating "the Washington, D.C. and Denver, Colorado [DEMS] operations only."[19] *That finding ends the "military function" inquiry.* The Commission easily could have relocated DEMS operations in those two areas, and then held an expedited notice and comment proceeding to address the issues surrounding a wholesale DEMS relocation, including its concern about promoting nationwide DEMS service, and the concerns of third parties (such as DIRECTV) that might be affected by such a move. The Commission did not, however, and its failure to do so cannot legally be sustained.

---

[18] The DEMS Licensees' quotation of hearing testimony of Larry Irving, Assistant Secretary of Commerce for Communications and Information and Administration of NTIA, does little to support their position. *See* Joint Opposition at 13 (*quoting* Reauthorization of the National Telecommunications and Information Administrator, 1997: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 105th Cong., 1st Sess. 77-79 (1997) (statement of Larry Irving)). In fact, Mr. Irving's statement clarifies that there "were only two areas in which there was going to be an interference problem, as I understood it." *Id.* The issue of whether further, nationwide relocation of the DEMS service was necessary to accommodate either the DEMS Licensees' commercial interests or anticipated Government operations in no way justifies the Commission's abandonment of notice and comment procedures.

[19] *DEMS Order* at ¶ 11.

B. The DEMS Licensees Now Concede that *Bendix* Does Not Support Their Position

The DEMS Licensees' latest treatment of *Bendix Aviation Corp. v. FCC*,[20] the only case cited by the Commission in the DEMS Order as a basis for its decision to forego notice and comment, is truly stunning. Just one month ago, these parties argued that the Commission "relocated DEMS to 24 GHz in *exactly* the same manner as it had relocated the radio navigation service at 13000 MHz in *Bendix*,"[21] and that *Bendix,* the alleged "benchmark case involving the Commission's application of the national security exception" squarely supported the Commission's actions.[22] Now, in a desperate attempt to preserve an untenable decision, the DEMS Licensees seek to *distinguish* the case.

Specifically, DIRECTV and others have shown that the DEMS Licensees simply misread the *Bendix* decision in the process of opposing petitions for reconsideration of the Commission's actions. A close reading of *Bendix* actually illustrates that the Commission's decisions with respect to the relocation of DEMS without notice and comment in this case cannot be sustained, because the Commission in *Bendix* afforded petitioners and affected third parties *precisely* the opportunity for notice and comment, and consideration of their interests, that DIRECTV and others have been denied.[23] In *Bendix*, and unlike the present case, "virtually every" affected industry segment had received an opportunity to express its view on the 13 GHz

---

20 272 F.2d 533 (D.C. Cir. 1959).

21 Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification, ET 97-99 (July 8, 1997), at 13 ("Relocation Opposition").

22 *Id.* at 11.

23 Consolidated Reply of DIRECTV Enterprises, Inc., ET 97-99 (July 23, 1997), at 8-13.

reallocation issues *before* "military function" was invoked by the FCC to relocate 8 GHz commercial uses to 13 GHz.[24] That fundamental fact stands in marked contrast to the situation here, where the Commission summarily changed the allocation at 24 GHz and reauthorized DEMS licensees there in a manner that may foreclose DIRECTV's proposed used of the 24 GHz band.

Now, the DEMS Licensees no longer contend that the *Bendix* scenario is on all fours with the current facts. Instead, they argue that "the principal difference" between *Bendix* and the DEMS relocation "is that in the DEMS relocation the government claimed an *immediate* need for the exclusive use of the 18 GHz band to eliminate interference from DEMS systems to government satellite systems that threatened national security."[25] Thus, the DEMS Licensees argue, "whereas in *Bendix* interference at some future date would have potentially impaired commercial operations, in the DEMS relocation there was an imminent interference to military satellite facilities that posed an immediate threat to national security."[26]

Of course, this claim is nonsense. First, as mentioned, even a cursory reading of the NTIA letters shows that the Government's interference concerns were narrowly confined to the exclusion zones set forth in the Attachments to those letters -- zones that encompass areas *only* in Denver and Washington, D.C. The letters do not ask for the immediate relocation of all

---

24 Amendment to Parts 2, 4, 7, 8, 9, 10, 11, 12, 16 and 21 of the Commission's Rules and Regulations to reallocate certain frequency bands above 25 mc, now designated for exclusive Amateur or other non-Governmental use, to Government services on a shared or exclusive basis, and conversely to reallocate to non-Governmental use certain bands now designated for Governmental use, *Memorandum Opinion and Order*, 17 Rad. Reg. (P&F) 1587, 1592 (released July 31, 1958), at ¶ 10.

25 Joint Opposition at 8 (emphasis in original).

26 *Id.* at 11.

18 GHz DEMS Licensees on a nationwide basis. And even more obviously, the Commission itself did not grant "immediate" relocation of nationwide DEMS operations. The Modification Order states that "immediate national security issues" related only "to Government Earth Stations in the Washington, D.C. and Denver, CO areas,"[27] and expressly permits DEMS Licensees to continue to use the 18 GHz band until midnight, January 1, 2001.[28] In light of the fact that DEMS operations may continue for over 3½ years in almost the entire United States, the DEMS Licensees' argument that the Commission "had sufficient time to conduct a separate NPRM proceeding" in *Bendix,* but did not have sufficient time here,[29] strains credulity and cannot be sustained.

Furthermore, with respect to the Denver and Washington, D.C. areas where immediate DEMS relocation may have been justified, the DEMS Licensees are simply wrong in suggesting that the Commission could not have conducted an expedited rulemaking without revoking or suspending 18 GHz DEMS Licenses in those markets.[30] The Commission quite easily could have modified the DEMS licenses[31] to permit DEMS operations in different spectrum bands, even the 24 GHz band, on an interim basis, while it held the required notice and comment rulemaking proceeding to determine the ultimate spectrum destination of the service. The dichotomy that the DEMS Licensees attempt to construct between "undermin[ing] NTIA's

---

27 Modification Order at ¶ 2.

28 *Id.* at ¶ 1.

29 Joint Opposition at 10.

30 *Id.* at 9 n.19, 11.

31 See 47 U.S.C. § 316 (permitting modification of licenses by the Commission "either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience and necessity").

national security request or depriv[ing] DEMS licensees of their statutory rights" therefore is an utterly false one.[32] The Commission could and should have held a proceeding -- and should initiate one now -- (1) to determine if nationwide relocation is necessary or desirable from a policy standpoint; and (2) if so, to examine the appropriate frequency bands in which to relocate the DEMS service. In the meantime, DEMS operations in Denver and Washington, D.C. can be permitted on a temporary basis at 24 GHz or some other band.

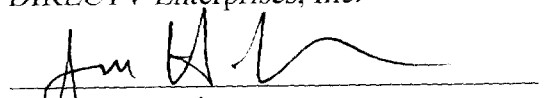
III. CONCLUSION

The Commission must reconsider its actions taken in both the DEMS Order and the Modification Order, hold a rulemaking to resolve the many issues raised by the wholesale relocation of DEMS licensees from 18 GHz, taking into account the interests of all affected parties, and *only then*, modify all DEMS licenses -- if necessary -- based upon the results of that proceeding. Any other result would be arbitrary and capricious, and would violate DIRECTV's due process rights.

August 19, 1997

Respectfully submitted,

DIRECTV Enterprises, Inc.



Gary M. Epstein
John P. Janka
James H. Barker
Nandan M. Joshi
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-2200
Its Attorneys

---

[32] Joint Opposition at 12.

CERTIFICATE OF SERVICE

I, James H. Barker, hereby certify that on this 19th day of August, 1997, true and correct copies of the foregoing Reply of DIRECTV Enterprises, Inc. were served by hand-delivery or by Federal Express (*) on the following parties:

Peter Cowhey, Chief
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Ruth Milkman
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Steve Sharkey
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Karl Kensinger
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Chris Murphy
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Glenn B. Manishin
Frank V. Paganelli
Stephanie A. Joyce
Blumenfeld & Cohen
Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036

Timothy R. Graham
Leo I. George
Joseph M. Sandri, Jr.
Barry J. Ohlson
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Richard E. Wiley
R. Michael Senkowski
Eric W. DeSilva
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20036

Jeffrey H. Olson
Robert P. Parker
Paul, Weiss, Rifkind, Wharton & Garrison
1615 L Streeet, N.W.
Washington, D.C. 20036-5694

Lawrence E. Harris
David S. Turetsky
Teligent, LLC
11 Canal Center Plaza, Suite 300
Alexandria, VA 22314-1538

David G. Frolio
David G. Richards
BellSouth Corporation
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036

Jay L. Birnbaum
Antoinette Cook Bush
Anthony E. Varona
Jeffry A. Brueggeman
Skadden, Arps, Slate,
Meagher & Flom, LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Pantelis Michalopoulos
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

William B. Barfield*
Jim O. Llewellyn
BellSouth Corporation
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

Ron Netro
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

James H. Barker